

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

MYCHAL THOMAS DAMON, and
JOSHUA JAMES BIRDRAITTLER,
Defendant.

Criminal Docket
No. 19-45-GF-BMM

Criminal Docket
No. 19-57-GF-BMM

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

Heard in the Charles Pray Courtroom
Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, Montana
December 16, 2019
2:05 p.m.

BEFORE THE HONORABLE BRIAN MORRIS

UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Freelance Court Reporter
BRILZ COURT REPORTING, INC.
4956 Smallwood Court
Helena, Montana 59601

Proceedings recorded by mechanical stenography, transcript
produced by computer.

A P P E A R A N C E S :

PRESENT ON BEHALF OF THE PLAINTIFF, THE UNITED STATES OF AMERICA:

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PRESENT ON BEHALF OF THE DEFENDANTS, MYCHAL THOMAS DAMON and JOSHUA JAMES BIRDRAITTLER:

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FEDERAL DEFENDERS OF MONTANA
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1 The following proceedings were had:

2

3 THE COURT: Please be seated.

4 Madam Clerk, please call the first case on the court's
5 calendar.

6 CLERK OF COURT: This court will now conduct motion
7 hearings in Cause Numbers CR-19-45-GF-BMM, United States of
8 America versus Mychal Thomas Damon; and CR-19-57-GF-BMM, United
9 States of America versus Joshua James Birdrattler.

10 THE COURT: Good afternoon, Ms. Adams.

11 MS. ADAMS: Good afternoon, Your Honor.

12 THE COURT: Looks like you brought in the A team
13 here.

14 MS. ADAMS: We have our billet chief, Tim Tatarka,
15 and Deputy Chief Lori Suek with me at counsel.

16 MS. SUEK: Good afternoon, Your Honor.

17 THE COURT: The A-plus team. I don't want to deflate
18 the grades.

19 Good afternoon, Mr. Branom.

20 MR. BRANOM: Good afternoon.

21 THE COURT: Good afternoon, Mr. Damon; good
22 afternoon, Mr. Birdrattler.

23 DEFENDANT BIRDRAATTLER: Good afternoon, Your Honor.

24 THE COURT: We're here on a motion in limine filed by
25 the government related to an earlier order I issued in October

1 of this year regarding -- or I'm sorry -- yeah. In October.
2 Regarding the polygraph evidence and the motion to suppress.

3 Ms. Adams, who's going to argue for the government?

4 MS. ADAMS: Mr. Tatarka will, Your Honor.

5 THE COURT: Before we get started, one of the items
6 that became an issue here was I directed the government to file
7 documentation of the policy that prohibits recording. And I
8 got a copy -- three documents were filed. Number one was a
9 government -- the FBI's general policy regarding recording that
10 contains presumptions of various kinds. And there was three
11 circumstances, I believe, or two circumstances when that
12 presumption of recording doesn't apply; one of those is the
13 public safety exception in New York versus Quarles, which I
14 don't believe applies here. And the other one was an issue
15 involving national security -- or terrorism. And I don't think
16 either of those are implicated here.

17 And then, the second document was layout of the
18 operational arrangements of the federal prosecutors and their
19 interaction with the tribal authorities in the State of Montana
20 -- District of Montana, excuse me.

21 And finally, a declaration by an FBI agent.

22 But nowhere did you actually produce the policy. So I'm
23 still wondering whether there is such a policy.

24 MR. TATARKA: And --

25 THE COURT: Why don't you go to the podium. If

1 you're going to argue, Mr. Tatarka, why don't you go to the
2 podium.

3 MR. BRANOM: And Judge, before we get too far into
4 this, you are holding a hearing in both these cases. I've
5 discussed it with Mr. Damon and Mr. Birdrattler. And they
6 consent to having the hearing combined.

7 THE COURT: Thank you, Mr. Branom.
8 Do you represent both of them?

9 MR. BRANOM: Yes, Your Honor.

10 THE COURT: Okay.

11 And Mr. Damon and Mr. Birdrattler, you understand you have
12 separate cases. The same issue is presented in each of your
13 cases. And we're going to talk about the legal issues that
14 each case presents and then talk about how the facts of each of
15 your cases apply to those legal questions. Do you understand?

16 MR. DAMON: Yes, Your Honor.

17 MR. BIRDRAITLER: Yes, Your Honor.

18 THE COURT: All right. Good.

19 Thank you.

20 Go ahead, Mr. Tatarka.

21 MR. TATARKA: So to answer the court's question
22 directly, the United States has given the court the policies
23 that it has with respect to -- with respect to the recording of
24 interviews, both generally and with respect to Indian Country.

25 There's one important clarification that I want to make

1 with respect to the court's -- the way the court has outlined
2 -- outlined that policy.

3 And I want to clarify that my purpose here is not to
4 relitigate the court's prior order. But I do want to make sure
5 that I'm laying the stuff out correctly.

6 The policies that the court noted, and the policies that
7 we gave you, with respect to the presumption of recording, is
8 the presumption of recording custodial interviews.

9 So, the court is correct that there is a presumption for
10 custodial interviews that they will be recorded, and there are
11 exceptions to that presumption in those cases that the court
12 outlined.

13 However, I don't think there's any dispute here that this
14 is a noncustodial -- that neither of these cases were custodial
15 interviews.

16 And I don't think that was something that has ever been --
17 that has ever really been contested.

18 THE COURT: They're not custodial in the traditional
19 sense that the defendants weren't free to leave. But they also
20 weren't field interviews. This wasn't something out on the fly
21 where the agent had to question a witness and didn't have time
22 to get the equipment together. This was a preplanned, staged
23 event. "Please come to the office for an interview."

24 MR. TATARKA: Absolutely. No question, Your Honor.

25 THE COURT: There's no reason the equipment wasn't

1 available. None of those kind of justifications would apply.

2 And I understand what you gave me are the presumptions
3 regarding custodial interviews.

4 MR. TATARKA: Correct.

5 THE COURT: I asked for the policy regarding
6 recording of the pre-polygraph interviews. And so you gave me
7 the presumptions. You gave me the second document, which was
8 -- and verify -- on the presumptions, there's a public safety
9 and national security exception. And that's New York versus
10 Quarles is the public safety exception. You've got a person
11 arrested in a crowded supermarket. He hides a gun in the
12 cantaloupe section of the produce aisle. "Where is the gun?
13 Somebody could get hurt. We've got to find this right now."
14 You asked him where it is. He doesn't get the benefit of
15 recording. That's perfectly appropriate.

16 The presumption, likewise, does not apply to limited
17 circumstances undertaken to get at national-security-related
18 intelligence. Doesn't apply here. Or questioning concerning
19 intelligence, sources, or methods.

20 The public disclosure which would cause damage to national
21 security. Do any of those apply here?

22 MR. TATARKA: Well, national security is implicated
23 with respect to the procedure that the polygraph -- and the
24 court addressed that thoroughly in its order. And again, I
25 want to be clear, though, with respect to: I understand that

1 the court can disagree with the policy and believe that perhaps
2 it should extend to some noncustodial interviews. But I want
3 to be clear that the government's position has been throughout
4 that this was a noncustodial interview. The presumption never
5 applied here.

6 THE COURT: And I'm sure -- state law differs from
7 federal, I understand that. I understand what the FBI's
8 obligation is.

9 But the presumption arose in the context of the cases back
10 in 2014 involving Agent Smiedala, where there was concern by
11 judges in this district about the process that happened --
12 similar process that would happen in these two cases. And in
13 response, we were told by the government, the FBI had changed
14 its policy and would start recording interviews.

15 And so I had none of these cases from 2014 until now.
16 It's a five-year gap. So, then, when this came up, I was,
17 like, "Oh, what's changed?" So I asked for the policy if
18 there's a change. And I was given the presumptions memo. And
19 I was given Exhibit 2, which was the District of Montana 2019
20 Indian Country Law Enforcement Initiative Operational Plan.
21 Lays out the interplay between the federal law enforcement and
22 the U.S. Attorney's Office and the tribal law enforcement and
23 prosecutors' offices.

24 Then, the third document -- I don't it -- that second
25 document really doesn't relate directly to anything regarding

1 recording or not recording interviews.

2 MR. TATARKA: I think there is one section in there
3 that reaffirms the nationwide policy with respect to a
4 presumption with respect to custodial interviews and an
5 encouragement to record with respect to the noncustodial
6 interviews.

7 THE COURT: Right.

8 And part of the reason that I asked for these documents
9 was to determine whether the judges in the district were
10 misled. That there had been a change in policy. We were going
11 to record in Indian Country, and it was reported back from the
12 Chief Judge of the district that he had been informed directly
13 by the director of the FBI at a conference that, yes, it had
14 been changed. And Montana was in large part the impetus for
15 that change.

16 The third document is a declaration from Josefina -- is it
17 Regula? I'm not sure of the pronunciation on that.

18 MR. TATARKA: Your guess is as good as mine, Your
19 Honor.

20 THE COURT: She's the Acting Unit Chief, Polygraph
21 Unit, Security Division, FBI. And she explains her impressive
22 background and credentials. And then she refers in
23 paragraph 5: "Per the FBI's Polygraph Program Policy Guide."
24 And then she quotes from that and discusses that. But you've
25 never produced that Polygraph Program Policy Guide, which,

1 presumably, is what she's relying upon as support for the
2 notion that this practice was pursuant to FBI policy.

3 MR. TATARKA: Okay.

4 And I don't have an answer to that question. If you don't
5 mind if I confer with my --

6 THE COURT: It's similar, to me, if I ask a lawyer:
7 "Provide me the statute that supports your position of this
8 action," instead of giving me a copy of the statute, you tell
9 me what you think the statute says and why it applies.

10 Where is the policy?

11 MR. TATARKA: Well --

12 THE COURT: Please consult, by all means.

13 (A brief off-the-record discussion was had among
14 Mr. Tatarka, Ms. Suek, and Ms. Adams at counsel
15 table.)

16 MR. TATARKA: Your Honor, my understanding is we have
17 -- I can look -- I can see what I can do about getting that --
18 that -- that statement that is referenced in the affidavit.

19 That said, our -- the United States is asserting to you
20 that we have provided you the relevant policies that we have
21 with this.

22 And the only other thing that I will add is my purpose
23 here today is not to relitigate the court's order.

24 THE COURT: Let me explain where I'm going, too. One
25 of the issues here, the government's proposed: "Well, we won't

1 play the recording. The agent will testify as to the content
2 of the interview."

3 One of the issues that may come up on cross-examination or
4 direct is: "You didn't take notes; did you?"

5 "Well, no, I didn't."

6 "And you didn't do X or Y?"

7 "No. Because I recorded it," or a portion of it. You
8 know, that's the response.

9 "And why didn't you record the whole thing?"

10 "Well, FBI policy prohibited it."

11 Well, how can defendant cross-examine the witness about
12 any FBI policy if we don't have a copy of the policy? We had
13 this referenced to the policy by the declaration of the agent,
14 but I don't have the policy itself. And so, I don't know --
15 you know, if that gives a complete picture of the policy, if
16 there's exceptions, if there are qualifications. I don't know
17 that. And I don't see how the defendant could explore that
18 issue without having a copy of this policy that's referenced in
19 the agent's declaration.

20 Do you see where I'm going here?

21 MR. TATARKA: I do, Your Honor. And it is my
22 understanding that the -- the -- that there isn't a written
23 policy about this. I understand there's a reference to that,
24 and I don't know the answer to the question about whether or
25 not that is the policy that we gave you. I know it's referred

1 to as the 2016 policy, and the date on it is 2014, but it went
2 into effect in 2016. But --

3 THE COURT: What I'm worried about is if it comes to
4 that during the trial, we have a cross-examination argument
5 about the policy. Well, was there really a policy? Or was it
6 -- was there contemporaneously-enacted policy that prohibited
7 recording. Or was that the agent's interpretation? Was that
8 the agent's supervisor's interpretation. Was that the
9 directive from headquarters? I don't know. Where is it? If
10 there is a the policy --

11 MR. TATARKA: Well, that can -- to the extent that
12 can be explored with the -- with the witness --

13 THE COURT: The problem is that the defendants are
14 working with one hand tied behind their back, because the
15 witness will say: "Well, here's what the policy says," without
16 the ability of the court or the defendant to review what the
17 policy is.

18 MR. TATARKA: Again, we do have a sworn -- a sworn
19 statement --

20 THE COURT: I understand that. You have a
21 statement --

22 MR. TATARKA: Not just by the agent, but by the
23 director of the unit that that is -- I don't think there
24 necessarily has to be a written policy in order for it to be
25 the policy. And I do understand there's a citation and that

1 that citation needs to be explored, and we're -- I can't
2 promise that we'll -- that we'll give it, because I'm not sure
3 what it's a reference to. But I can assure you --

4 THE COURT: If there's no policy, what's the basis
5 for the statements in the agent's declaration? For example,
6 paragraph 5: "Polygraph examiners must advise all individuals
7 undergoing a polygraph examination whether the examination is
8 being monitored." Why must they? Because she says so? Where
9 is the policy?

10 MR. TATARKA: There's nothing wrong with that, Your
11 Honor.

12 THE COURT: I know there isn't.

13 MR. TATARKA: There are plenty of cases where: "The
14 policy is what I say it is, because I'm in charge. I'm
15 responsible for that unit."

16 And she's the person responsible for that unit.

17 I don't think -- I don't think it is -- it -- that -- to
18 the extent that this isn't about whether there are references
19 to a written policy, and the question is just: Is it the
20 policy because the person in that position says it's the
21 policy? That is perfectly subject to regular
22 cross-examination. "Are you telling me that this is the policy
23 just because you say it is?"

24 THE COURT: All right.

25 But there is a reference in here to this document. Looks

1 like a document, "Program Policy Guide."

2 MR. TATARKA: And I can -- I can promise that I will
3 get you -- I can get you an answer to the question about
4 whether or not either that we can produce that for you, or I
5 can get you an explanation about why we can't. I don't know of
6 any reason why we can't. And I don't know why -- I don't know
7 why there's a reference to a policy guide when we have been
8 told that there is no written policy on this point.

9 And maybe -- it's possible that that is a statement -- you
10 know, sort of about the -- about the policy of making policies,
11 rather than --

12 THE COURT: I'm quoting here: "Per the FBI's
13 Polygraph Program Policy Guide, most recently updated November
14 20, 2015," that sounds like a document to me.

15 MR. TATARKA: No. No. I'm not saying that. But I'm
16 saying it's conceivable to me that that is a policy guide that
17 says these are the times when you can make a policy. Not a
18 substantive policy on -- on --

19 THE COURT: Okay.

20 But then it goes on: "The policy states" -- "states."
21 That, to me, isn't like I, as the director --

22 MR. TATARKA: No, I agree.

23 THE COURT: That the polygraph examination is, quote,
24 "a sensitive investigation technique," end quote, and that the
25 quote, "utility of the very sensitive technique is likely to be

1 compromised by unwarranted public disclosure." End quote.

2 MR. TATARKA: And you want to know if there's
3 something on one side or the other of that quote. That is
4 perfectly reasonable.

5 THE COURT: Yes. So that when you're quoting like
6 that, it sounds to me like there's a document. I haven't seen
7 that document. If it has to be filed under seal, that's fine.
8 I just want the parties to have the ability to fully explore
9 the parameters of this alleged policy. That would be -- if
10 that would be the justification by the witness for not
11 recording the interview or not doing various things.

12 MR. TATARKA: Yes, Your Honor. And I completely
13 understand that. And I appreciate the court's patience. I
14 know that you've had sort of a parade of various government
15 attorneys here. And I hope that the court recognizes that
16 that's because we've taken this -- the court's concern
17 seriously and have had, again, the criminal chief, the
18 appellate folks here to testify -- or here to argue before you.
19 And I understand that that can result in some gaps in what the
20 entire knowledge of the U.S. is. And the best that I can say
21 is that I can either get that policy for you, or I can get you
22 an explanation about why I can't, if I can't.

23 THE COURT: All right.

24 Later on in that same paragraph, the agent refers to: "It
25 has been the best practice of the FBI polygraph unit."

1 Now, that sounds more like: "Here's how we do it in
2 practice. This is our unofficial policy," as opposed to a
3 written document that seemed to be referenced earlier in the
4 paragraph.

5 MR. TATARKA: And again, to -- I don't -- that, it
6 does seem to me -- again, something that if the agent is under
7 -- is under a misunderstanding, that that is subject to
8 something that can be -- could be clarified through cross -- or
9 that could be attacked through cross-examination.

10 THE COURT: All right.

11 Go ahead.

12 MR. TATARKA: So, again, I can -- I will work on
13 getting you an answer for this. I really do -- again, I
14 appreciate your patience for the variety of folks coming up
15 here. The purpose I wanted to with this one come up this time
16 is because I really do think that we -- we are taking seriously
17 the court's concerns about completeness. And that while we can
18 -- can disagree about whether or not it's applicable in these
19 particular cases, we certainly recognize that there are times
20 where a partial recording could raise completeness issues. And
21 we do think that those issues are resolved as proposed in these
22 cases by -- and sort of -- in a similar way to the Virginia --
23 or New Hampshire Supreme Court issue that the court referenced
24 -- or case that the court referenced in its previous order, in
25 saying -- in that case, the court excluded the recorded

1 statements. In this case, the United States is prepared to
2 forego those recorded statements and have the testimony
3 presented under the regular rules of evidence, which
4 essentially -- and I do think this is in good faith by the
5 government -- essentially, unwinds the issue of the partial
6 recording. And puts it in the -- at least on -- that deals
7 with that issue of partiality and the issue of completeness.

8 THE COURT: Okay.

9 So let me just bring this up directly with you, and I will
10 explore it with Mr. Branom when he comes up.

11 So we have a trial and the agent testifies, and he says:
12 "I sat down," lays the scene about where this happened. "And I
13 started asking Mr. Damon, Mr. Birdrattler. I conducted
14 interrogation and asked them a number of things. And during
15 the course of the interrogation, each of them separately
16 confessed to some criminal culpability." And that happens a
17 lot. It doesn't happen in Montana state courts anymore, but it
18 happens in federal courts around the country, where the agent
19 simply testifies about an interview, and whether it's custodial
20 or not, we can disagree, without a recording, recording of
21 that.

22 MR. TATARKA: Uhm-hum.

23 THE COURT: What happens, then, on cross-examination?
24 What's the scope of cross-examination?

25 MR. TATARKA: I think the scope of cross-examination

1 is that the defense can get into -- so, I think the guide there
2 is Model Jury Instruction 4.1 when a defendant has a -- right?
3 You've given this a number of times: You've heard a
4 defendant's statement. It's up to the jury to determine both
5 whether this statement was made, or how much weight to give it.

6 I do think that the cross-examination can get into the
7 issues of why that, conceivably, should be given less weight,
8 even including the fact that a portion of it was --

9 THE COURT: Okay.

10 So, cross-examine the agent: "You don't have any notes of
11 that interview; do you?"

12 "No."

13 "Okay. And you didn't make a written record of that
14 interview; did you?"

15 "No."

16 All right.

17 And the agent says: "Well, I didn't have to. I recorded
18 it."

19 Then we're right back where we started.

20 MR. TATARKA: Well, and that happens -- there's
21 certainly a number of ways that the defense can raise issues
22 that we would then -- again, this is -- exactly happened in the
23 Deputee case, not with respect to recording, but with respect
24 to basically the defense said: "Well, why didn't -- you've
25 only told me three things. Why did it take you two hours to do

1 it?"

2 And the court -- and again, Ms. Suek was part of that
3 case, if you have specific details. But, essentially, the
4 court, both the district court and the Ninth Circuit, said:
5 "Yes, at that point, it's perfectly appropriate to say: 'This
6 happened in the context of a polygraph interview where a
7 polygraph wasn't conducted. That's why it took so long.'"

8 And again, if -- there's nothing wrong with the defense
9 getting into the issue of -- it's, essentially -- you know,
10 this court referenced the Ninth Circuit's decision in Wright,
11 and although that was in the context of suppression, what the
12 court said there is: "Sure. The fact finder can look at --
13 can take into account the fact that it was unrecorded. And the
14 court -- and the factfinder can take into account the
15 government gave its reason for why it wasn't recorded."

16 There's no reason why the jury can't make that -- I don't
17 think there's any need for an instruction for the -- beyond
18 Model Rule 4.1, for the jury to be able to -- for the defense
19 to be able to raise that as a reason to distrust the agent's
20 statements, and the jury to consider the government's response
21 to that.

22 THE COURT: All right.

23 So, I understand -- if the defendant asks the question:
24 "Okay. You didn't -- you don't have notes of this interview.
25 You didn't make a written record of this interview." And that

1 wouldn't implicate the recording or not recording. Or wouldn't
2 raise it directly. It wouldn't raise the polygraph issue.

3 But -- and I might be willing to say: Okay. You know, in
4 lieu of the instruction, I'm going to allow the defendant to
5 cross-examine -- in lieu of the adverse inference instruction,
6 I allow the defendant to cross-examine the agent about the
7 things that aren't there. We don't have a signed confession.
8 We don't have something written out of that nature.

9 MR. TATARKA: Yep.

10 THE COURT: But, I'm trying to figure out what
11 happens when either the agent on cross, or you get up on
12 redirect, and say: "Well, you didn't take notes, because you
13 recorded it; right?"

14 He says: "Oh, yeah, I did that."

15 MR. TATARKA: Well, I recorded.

16 THE COURT: Recorded a portion.

17 MR. TATARKA: Recorded a portion of it.

18 THE COURT: Then we're back with --

19 MR. TATARKA: But I don't think there's a problem
20 there. It seems like that's -- that seems like that's fodder
21 for the defense. The defense can say --

22 THE COURT: But this is in -- but it's no problem,
23 except it might open the door back to the adverse inference
24 instruction.

25 MR. TATARKA: No, Your Honor I don't think so.

1 THE COURT: Why?

2 MR. TATARKA: Because there's no reason why the --

3 THE COURT: And how do I explain to the jury we're
4 not playing the recording?

5 MR. TATARKA: Well, I think -- I think that's --
6 that's absolutely to the defense's benefit.

7 THE COURT: To not play the recording?

8 MR. TATARKA: To not play --

9 THE COURT: I agree. I agree.

10 MR. TATARKA: I mean, I think there would be a real
11 problem if the defense says: "We don't want the recording in."
12 And near as I can tell, the defense -- and this is something
13 different than the issue in Graham, where it was much more
14 complicated. The defense has never said that it has any
15 interest in eliciting that recording. It does seem like it
16 would be self-pitch softball for them to say: "We don't want
17 the recording admitted, but we want to be able to raise,
18 because -- we don't want -- we want to be able to raise
19 something that casts doubt on the interview." And get both
20 things. That actually does seem like a case --

21 THE COURT: How would the defense cross-examine the
22 agent under that theory, where they can't cast doubt on the --

23 MR. TATARKA: Well, no. I don't think there's any
24 problem with the defense casting doubt. I just don't think
25 that -- I don't see any reason why the defendants' casting

1 doubt on the recording procedure necessitates the --

2 THE COURT: No, not the recording procedure. I'm
3 talking about --

4 MR. TATARKA: No. But what I mean, Your Honor, is to
5 say: I don't see any reason with the defense saying: "Did you
6 record this interview?"

7 "Well, I recorded part of it."

8 "Why did you not record the other part?"

9 And raising the allegation that the officer did that --
10 agent did that for nefarious reasons. But that should not earn
11 him an adverse instruction from you. He can make that
12 argument; he just doesn't get the court to pile on.

13 THE COURT: I thought the government proposed a
14 situation where you don't discuss the recording.

15 MR. TATARKA: We don't intend to.

16 THE COURT: Right. So, your motion in limine
17 contemplates a scenario whereby the agent comes in, takes the
18 stand, and explains the -- describes his recollection of the
19 interview with the defendant.

20 MR. TATARKA: Yes.

21 THE COURT: All right.

22 MR. TATARKA: And if the --

23 THE COURT: So then -- I'm trying to understand the
24 scenario.

25 MR. TATARKA: I'm sorry, Your Honor.

1 THE COURT: So, we had that. Now, we get to
2 cross-examination. And the defendant -- the balance here is
3 allowing them to cross-examine in a robust way, but without --
4 I mean, I'm talking about not tying both the government's hands
5 behind their back, but trying to -- you know, I'm not a fan of
6 the process. You understand that?

7 MR. TATARKA: I absolutely do.

8 THE COURT: But I'm trying to make sure that this
9 will be fair. So allowing the defendant to have some ability
10 to cross-examine and challenge the agent, because the agent
11 doesn't have a written record, agent does have notes of the
12 proceeding. How do you remember exactly what was said? Things
13 of that nature. This was a long time ago, without getting into
14 -- without the defendant being able to attack him unfairly,
15 attack the agent unfairly about: Well, you didn't -- you know,
16 not getting the recording -- I don't want -- I don't want the
17 defense to be able to induce the recording response that might
18 trigger, then, the adverse inference instruction.

19 MR. TATARKA: No. I understand where you're coming
20 from.

21 THE COURT: So I'm trying to wrestle with the
22 procedure where the agent testifies: "I interviewed the
23 defendant on this date. It was -- it took place at this
24 building. We started at, I think, about one o'clock, and my
25 recollection was it went till 1:20," whatever the time was.

1 "During the course of the interview, I asked him about the
2 allegations." I think there were Miranda waivers in both these
3 cases.

4 MR. TATARKA: Yep. Yep.

5 THE COURT: "I read their rights, they signed Miranda
6 waivers, and then they confessed to some criminal culpability."
7 And whatever further question you want to ask.

8 Mr. Branom then gets to cross-examine. And allow him to
9 attack the witness's memory; allow him to attack the fact the
10 witness doesn't have notes that were contemporaneous notes of
11 the proceeding; that he doesn't have a written confession,
12 things of that nature.

13 And then both sides have a little bit of jeopardy here. I
14 mean, I don't want -- the defendant -- the easy thing for
15 Mr. Branom is to just say: "Well, you don't have a recording?"

16 "Well, yeah, I do."

17 And I'll allow the interview and that triggers the adverse
18 inference instruction.

19 But Mr. Branom, I assume, doesn't want the recording
20 played, because it's in the defendant's own words. And so, I'm
21 trying to cabin the defendant's cross-examination where it
22 gives him a fair chance to attack the memory of the agent, the
23 credibility of the agent, a few things like that, without
24 opening the door to either the playing of the recording or the
25 adverse inference instruction. So I'm trying to get the

1 parties to provide some guidance as to -- you know, if we
2 follow your suggestion, we have the agent testify based on
3 memory about what happened. How do I structure or limit the
4 areas in which the defense can cross-examine without getting
5 into the problem of opening the door? I'll leave it up to the
6 government, I guess. Potentially leave it up to the government
7 to decide, you know, when Mr. Branom crosses the line that
8 would allow you to play the recording. Said: "Yeah, we have a
9 recording." And then explain all the reasons for the
10 polygraph, the nonrecording and all that. But we have a
11 recording of the defendant's own words about his criminal
12 culpability.

13 Do you understand that what I'm --

14 MR. TATARKA: I do. I -- my impression, and I -- and
15 I think that the court may be thinking about this at one level
16 more nuanced than I had been. Because my -- my impression of
17 it was if -- if the -- if the defense wants to cross-examine
18 about the absence of a recording, it would be free to do so
19 with a -- without an inference -- without an adverse inference
20 one way -- without the court directing an inference one way or
21 the other.

22 Now, I understand that the court is, like I say, thinking
23 on another level of nuance, is: Would there be a way that he
24 could not mention the recording, but put us in a -- put the
25 government in a position where the government would need to

1 mention the recording in order to defend itself?

2 THE COURT: Right. In order to restore the
3 credibility of the witness, yeah.

4 And that brings up -- back to the policy again. You know,
5 okay. We've opened the door, the defense has crossed some
6 threshold. You want to be able to restore the witness's
7 credibility: "I have a recording."

8 "Okay. Well, the whole interview?"

9 "No. Just a portion."

10 "Well, why not the whole thing?"

11 "Policy."

12 That's where my concern about the absence of the policy
13 comes up. I don't doubt that's the practice. But I want to
14 make sure there was a contemporaneous policy to support the
15 practice if we're going to have Mr. Branom cross-examining
16 about that policy. And that's what my concern is. If there is
17 a written policy, I want to get a copy of it, and --

18 MR. TATARKA: I hear you.

19 THE COURT: So, if there are qualifiers and
20 presumptions and things of that -- exemptions, we know what
21 those nuances are.

22 MR. TATARKA: Certainly.

23 And as I said, I will do my best to either get you and the
24 defense that policy, or explain why we don't have it.

25 THE COURT: So, before you sit down, do you have any

1 suggestions, then, about -- I mean, how do you envision this
2 testimony going? If it's along the lines you're proposing with
3 my concerns, how does the defense cross-examine here? What, in
4 the government's view, would be an appropriate scope of that
5 cross-examination?

6 MR. TATARKA: (No response.)

7 THE COURT: You know, these were nine months ago, I
8 can't remember when they took place. One was April, I think.
9 One was --

10 MR. TATARKA: Well, the good thing is, I think one
11 thing that -- that would allow for a little bit broader scope
12 of the defendant's cross-examination before -- before we have
13 to get into the issue of the recording, is the fact that in
14 both cases, we have two agents that can testify --

15 THE COURT: And that would be your plan to call Agent
16 Smiedala and Agent Burns, I think in one case. Who was the
17 other case?

18 MR. TATARKA: Schneider. That would be -- I won't be
19 doing the --

20 THE COURT: You would call the two agents. They
21 weren't -- were they -- I don't remember offhand if they were
22 both there for the recorded portion.

23 MR. TATARKA: They are there for the recorded
24 portion.

25 THE COURT: The problem with that -- I mean -- Agent

1 Smiedala elicited -- allegedly elicited the confession before
2 the recording. Right?

3 MR. TATARKA: Yeah.

4 THE COURT: So, then, the second agent would come in
5 and say: "Well, I heard Agent Smiedala ask the question. I
6 heard the defendant make the admissions"? That's really
7 getting --

8 MR. TATARKA: No. I see very little reason to keep
9 the -- sort of the full story from the -- from the jury if it's
10 -- if it's put into play, that we need to explain the context
11 of these statements --

12 THE COURT: See, but that's -- the reason we don't
13 have the full story is because you didn't record the full
14 interview. That's the problem I have. If the government
15 recorded the full interview, we're not here. There's no issue
16 here. You didn't do it. You say you have a good reason.
17 Okay. But, you know, now, you're kind of wanting to have --
18 let the government provide some corroboration --

19 MR. TATARKA: I don't know that it's -- I don't know
20 that it's corroboration. I think it's exactly what -- in my
21 mind, that's exactly what the -- what the defense wants to
22 challenge is the fact that this -- that this was -- that the
23 government was doing a selective recording.

24 THE COURT: Right. But that's -- hold up.

25 MR. TATARKA: If they want to challenge that, they

1 should be able to get the whole thing. If they don't want to
2 challenge that, we shouldn't force them to.

3 Here's what I think -- I do think it's a big concession by
4 the government to not play the defendants' actual recorded
5 statements. The other concession is: I don't think the
6 government should be able to put the defense in a position
7 where it has to choose that line of attack if it doesn't want
8 to.

9 But if it -- if the defense chooses that line of attack --

10 THE COURT: Which line? Hold up.

11 MR. TATARKA: If the defense wants to challenge the
12 fact that this was a partially-recorded interview.

13 THE COURT: Right. And again, I'm not going to allow
14 Mr. Branom free rein to cross-examine without opening the
15 possibility of the playing of the recording.

16 MR. TATARKA: Yeah.

17 THE COURT: But I'm trying to figure out what would
18 be fair to allow him to ask that wouldn't cross that line as a
19 legal matter, not a strategic matter for you, where am I --

20 MR. TATARKA: Yeah. And I think the best guidance is
21 Deputee. Again, that wasn't, obviously, about the recording.
22 That was about -- about how the court there walked the line
23 about the fact that this was in the context of a polygraph
24 interview.

25 And again, I think -- if the defense wants to take the

1 line of attack that it was partially recorded, then it can do
2 that. But, it does so without the -- without the adverse
3 instruction.

4 If the --

5 THE COURT: Well, I guess that's going to depend on
6 how the agent frames it. You know, I'm not sure I can give
7 everyone a definitive ruling here today. It's going to depend
8 in part on what happens. How the testimony evolves at trial.
9 I'm just doing the best we can to try to develop some
10 parameters.

11 MR. TATARKA: So long as the court recognizes that if
12 we -- if we lack that guidance, that we're not -- we're not
13 committing to not recording -- or not playing the recording.

14 THE COURT: What I'm going to have to figure out is:
15 Where do I draw the line where Mr. Branom doesn't get to attack
16 you for not recording without -- we're triggering the adverse
17 inference instruction. I don't think the agent gets to
18 preemptively say: "Well, I recorded the whole thing."

19 MR. TATARKA: I agree.

20 THE COURT: No adverse inference instruction, because
21 Mr. Branom induced me into saying that.

22 MR. TATARKA: No. I agree with that, Your Honor.

23 THE COURT: So that's what I'm trying to figure out
24 is where is his line going to be? You'll have to work with
25 your agent and plan the testimony about how he responds to

1 those kind of questions. And I don't know if it's going to
2 take some sidebars at trial or not. I'll hear from -- anything
3 else you want to add before Mr. Branom gives his view of where
4 those lines can be drawn?

5 MR. TATARKA: I have one minor point.

6 THE COURT: Yeah.

7 MR. TATARKA: Which is with respect to the language
8 of the instruction, and I don't know whether that's something
9 that we need to get into today or not, but I would just note
10 for the court that -- that the "view with distrust" language,
11 which I think the court got from the Montana cases, is not --

12 THE COURT: We all go back to our roots, Mr. Tatarka.

13 MR. TATARKA: Amen.

14 THE COURT: We can't help ourselves.

15 MR. TATARKA: But that was never language that was
16 crafted for a jury to hear. If you look at all of those cases
17 that are identified in Deines, all of them say they will be
18 viewed by distrust in a judicial determination of voluntariness
19 or the like.

20 If you look at the instructions that were crafted toward
21 -- with an eye towards the jury, both the Massachusetts Supreme
22 Court case, which the court cited, and Judge Molloy's case in
23 Graham, the language that they use was not the "view with
24 distrust" language. It was the language of, you know, to view
25 -- review with great care or caution. And that's the language

1 that's also used by this court, by federal courts, with respect
2 to --

3 THE COURT: Well, see, that was the instruction I
4 came up with in the context of the order. As trial approaches,
5 if you want to propose --

6 MR. TATARKA: And like I said, I knew that was sort
7 of a minor point, I just wanted to -- since it was on my mind,
8 I wanted to frame it for you.

9 THE COURT: All right.

10 Well, why don't I hear from Mr. Branom now, and I'll give
11 you a chance to rebut. And be thinking about how we should
12 appropriately draw these lines.

13 MR. TATARKA: And I'll consult with these folks who
14 are more likely to be in the mix of it.

15 THE COURT: Thank you, Mr. Tatarka.

16 MR. TATARKA: Thank you, very much.

17 THE COURT: Mr. Branom.

18 MR. BRANOM: Thank you, Your Honor.

19 THE COURT: You're moving a little spryer,
20 Mr. Branom.

21 MR. BRANOM: Not really, Your Honor. I start
22 physical therapy Wednesday. And spry is a relative term.

23 THE COURT: Let me just set the table here.

24 MR. BRANOM: Sure.

25 THE COURT: So, as you recall my order, I did not

1 suppress those statements. I don't think the Ninth Circuit law
2 permitted me to do that. But I did raise some serious concerns
3 about it.

4 And the government's proposed -- in order to address some
5 of those concerns, the government proposed this process by
6 which the agent would testify based on his memory about what
7 happened. And if that's the case, I want to give you the
8 ability to cross-examine the witness. Test his memory about
9 when this happened. You know, point out to the jury how long
10 ago it was. Ask the agent whether he has contemporaneous notes
11 of what happened, those kind of things, without -- I mean, I
12 guess you have to decide: Do you want the recording played?
13 Is it better for your clients to play their portion of the
14 recording, and then you get the adverse inference instruction;
15 or would you rather keep that out, because then you don't have
16 the defendant's own words. The case law expresses great
17 concern about whether the defendant's own words incriminate
18 him.

19 But I don't want to let you control entirely the process
20 by cross-examining so aggressively and on such a range of
21 issues that you would induce the agent to say something:
22 "Well, I have to" -- the agent have to defend himself by
23 saying: "Well, I recorded part of it."

24 Do you understand how I'm addressing this?

25 MR. BRANOM: I believe so. Let me -- initially, the

1 motion was to suppress the statements, recorded or otherwise.

2 THE COURT: Right.

3 MR. BRANOM: Okay.

4 So, I think, Judge, we're here -- and you are the
5 gatekeeper of what --

6 THE COURT: I denied the motions -- I mean, I, yeah,
7 denied the motion to suppress.

8 MR. BRANOM: Right. But you also indicated you were
9 not happy or comfortable maybe is a better word, with how they
10 got -- how we got here. That the government -- they proposed,
11 and apparently informed the court that we're going to record
12 stuff. And then all the sudden, here's this exception.

13 In some ways, I think this is analogous, if you'll
14 remember, I believe it was the first Devereaux case, there was
15 testimony there was a knife. And the one officer even drew a
16 knife. But nobody collected the knife.

17 Here, the government -- through the FBI, either -- I don't
18 know how we put the toothpaste back in the tube. There is the
19 recording. I mean, that's -- and everything you read, juries
20 think the lawyers are hiding stuff anyway. So now, it's going
21 the look like either it's them or me, we're hiding something
22 that there's this recording. As I understand the government's
23 motion in limine, just having the agent testify: "Oh, this is
24 what he told me," you should still give the cautionary
25 instruction, because we have, on both these cases, this time

1 where it's just Agent Smiedala purposefully not recording what
2 happened. I mean, that's the -- you know, and we've all these
3 cases you've cited, all the -- these people that come from
4 varying degrees of sophistication and background, basically,
5 tell us he does the same thing.

6 So we've got the perp -- and he doesn't have the other
7 agent in there. You know, I will -- I can tell the court I
8 can't think of a time I even came close to questioning Agent
9 Burns' veracity. I think he's straight as string. But he
10 wasn't in there. And that's the troubling thing is you've got
11 the one agent -- and the other elephant, that it's a polygraph.
12 I mean, that's -- it's not admissible. So, purposely --

13 THE COURT: The results of the polygraph aren't
14 admissible, but no one took a polygraph.

15 MR. BRANOM: Right. So, in my mind, then, this whole
16 polygraph exception, how does that even come in? And I, on one
17 of these, if not both, I remember cross-examining Agent
18 Smiedala: "Well, why didn't you go ahead and do it anyway?"

19 There are false confessions. Well, no. Which either goes
20 to that his purpose is to elicit a confession, not necessarily
21 the truth. But they purposely -- they record -- you know, you
22 can't do it halfway, I guess, is my -- when it's going our way,
23 we record it. But this mystery stuff ahead of time, we're not
24 going to preserve. And I like your one hand behind the back
25 analogy. I don't know what happens. And I think it was at the

1 second hearing, I guess that was Mr. Birdrattler, I asked Agent
2 Smiedala: "Well, if I knew the questions specifically to ask
3 you of what happens, you're going to tell the truth." And tell
4 you, in your gatekeeper function, what happens. But I don't
5 know that.

6 Of course, the remedy to that is record it. Shoot, record
7 it and submit it ex parte in camera, you know, so I don't sell
8 it to Al-Qaeda, or whatever the concern is.

9 But I think the instruction needs to be given, I guess
10 that's the bottom line of my -- to give both these gentlemen a
11 fair trial, when the government controlled the process of what
12 we're going to preserve this evidence. We're not going to
13 preserve this part of it. To me, that's the issue. Is if we
14 have either the whole picture or no picture, Judge.

15 THE COURT: Well, right. But the proposed solution
16 by the government is to take the recording out as much as we
17 can. And now it's an interview between one federal agent and
18 one defendant. And you can cross-examine about the inequity
19 and power there, about the fear, about whatever defendant might
20 have been feeling, and how -- was the agent bullying the
21 defendant. I don't know. And the fact these were, you know,
22 nine months ago, twelve months ago. "How do you remember all
23 that, word-for-word what happened. How could you possibly
24 remember the questions you asked and responses. You didn't
25 have written notes; did you?"

1 "No."

2 "And you didn't get a signed confession; did you?"

3 "No."

4 MR. BRANOM: Well, shouldn't his answer really be:
5 "Because I listened to the recording last night," I mean, to
6 prepare for trial, I'm going to look at the best thing I have.
7 "Well, I got a tape, so I'm going to listen to that."

8 THE COURT: Then, when that happens, though, then
9 okay. Now, we've opened the door to the adverse inference
10 instruction and the playing of the tape, potentially. If I'm
11 going to -- you want the adverse instruction, even without the
12 playing of the tape?

13 MR. BRANOM: Absolutely, Your Honor.

14 THE COURT: Why?

15 MR. BRANOM: Because the government controlled the
16 process. The government chose to preserve -- why let the jury
17 only hear part of it, not all of it. And as the court laid out
18 in the order -- if I hadn't seen the, you know, the banner we
19 get to the email, really, I'm thinking, wow, I pulled this off.
20 And then at the end, you say no, I'm not going to suppress it.

21 But they --

22 THE COURT: I like to keep you guessing. That way
23 people read the whole order, Mr. Branom.

24 MR. BRANOM: Indeed. Oh, boy.

25 And these two gentlemen, believe me, they've read it, too.

1 They controlled the process. And the process -- one,
2 apparently, is in contradiction to what Judge Christensen was
3 told by the very head of the FBI of what was going to go on.
4 And so, I think to make it fair, and that's the bottom line
5 here, we want it to be fair, that they purposely -- you know,
6 they tell the court we're going to do it. And then they, well,
7 this falls under the exception, which it apparently really
8 doesn't. You know, this isn't national security or the -- you
9 know, the live bomb in the store or whatever. And before I
10 forget, you know, we argued that it was essentially a custodial
11 interrogation. And I don't want to concede that.

12 But when they control the process and crafted -- and we
13 need to remember in Mr. Birdrattler's case, there was the first
14 one, and then it was the: "Oh, shoot. It didn't work. Hey,
15 you need to come back again."

16 THE COURT: Yeah.

17 MR. BRANOM: Okay. So, I think that's significant,
18 too.

19 Whether or not it's the recording or the testimony, it got
20 there the same way, which was this period of time where Agent
21 Smiedala doesn't even trust another FBI agent to be in there to
22 hear what's going on. And I think that calls for the
23 cautionary instruction to the jury.

24 THE COURT: Which instruction?

25 MR. BRANOM: Well, you're right. We haven't -- I

1 think those are due Monday, a week from today.

2 THE COURT: Well, what's the trial date in these two
3 cases?

4 MR. BRANOM: January 6th.

5 THE COURT: For both?

6 MR. BRANOM: Yes. Which is what I tried to bring up
7 in chambers last week. It got brushed aside. But we've got an
8 issue there.

9 THE COURT: Where are we on speedy trial here?

10 MR. BRANOM: I don't know. Well, actually, quite
11 frankly, once the government filed the instant motion, that
12 stopped the clock.

13 MS. SUEK: It does, yes.

14 THE COURT: Did you have a preference for which case
15 would go first?

16 MR. BRANOM: Well, yeah. Mr. Damon's in custody. We
17 want him to go first. And I've discussed that with
18 Mr. Birdrattler. I think it's eminently fair that Mr. Damon go
19 first.

20 THE COURT: So, we get Mr. Birdrattler right after
21 that in January?

22 MR. BRANOM: Well, we've got Mr. Bird, who I met with
23 this morning, on the 13th. G41 14

24 THE COURT: All right.

25 Well, Mr. Birdrattler is not in custody. If it was the

1 20th or 27th, probably wouldn't be the end of the world.
2 But/for the court -- was it Mr. Birdrattler had the two
3 recordings?

4 MR. BRANOM: Well, there's only one recording. And
5 then all the sudden, shoot, it isn't working.

6 THE COURT: That was Mr. Birdrattler?

7 MR. BRANOM: Yes.

8 THE COURT: That would be the second trial? Okay.

9 So, what's your best case for the idea that you get the
10 adverse instruction regardless of whether the government plays
11 the recording?

12 MR. BRANOM: I think it's -- quite frankly, it's your
13 ruling on the motion.

14 THE COURT: Flattery gets you nowhere, Mr. --

15 MR. BRANOM: Well, no. Respectfully, Your Honor, all
16 the cases the government cites are somewhat dated, and I think
17 that's important, because they're all before this announced
18 policy to the court that Indian Country cases are going to get
19 recorded.

20 So, I don't have a -- this is new ground. I suppose I
21 would cite Graham that Judge Molloy was going to give a
22 cautionary instruction. I think, and I'm willing to stand
23 corrected, that she pled before it was argued.

24 MR. TATARKA: Pled mid-trial.

25 MR. BRANOM: Right. But before, you know, it was

1 actually given to the jury so there isn't quite the imprimatur
2 that it was --

3 THE COURT: But they also played the recording;
4 didn't they?

5 MR. BRANOM: Right.

6 THE COURT: So, you know, I understand -- if the
7 recording comes in, the instruction goes with it. But there
8 again, keeping in mind that the recording may not come in here.

9 MR. BRANOM: Yeah. It's up to the government how to
10 put on their case. And I'm not going to sandbag. But I guess
11 it's very troubling to me, move to suppress, okay. You can't
12 suppress. And then we're going to hide from the jury that it
13 actually was recorded. And again, from our perspective, more
14 important, that they only did half of it. They only did the
15 part they liked.

16 THE COURT: That will all come out. But the question
17 is whether you want the playing of the recorded portion for the
18 jury. If you're willing to concede -- to allow that, then this
19 whole argument/exercise is moot, because then we give the
20 adverse instruction and go to trial.

21 MR. BRANOM: Well, but like I said, I can't -- I'm
22 not at that table.

23 Certainly, yes, if they play the record. But I think even
24 -- I guess I don't see the distinction of the recording versus
25 "well, here's what he said," that was adduced from each

1 defendant through this portion where he's alone with Agent
2 Smiedala and nobody tell us. So, I don't --

3 THE COURT: I mean, that's part of the jury's
4 evaluation on credibility. You've got one agent in the room
5 with the defendant. And you cross-examine Mr. Smiedala --
6 Agent Smiedala. "Oh, and Agent Burns was down the hall; wasn't
7 he?"

8 "Yes, he was."

9 "And you could have had him in there to serve as a
10 witness; right? And you didn't do that; right? Okay." And --

11 MR. BRANOM: But as we -- each case, there's evidence
12 that he could have recorded that portion. He had the
13 technical --

14 THE COURT: Well, I know that.

15 MR. BRANOM: -- ability. So the fact --

16 THE COURT: I mean, that's -- that's what I
17 understand about the Birdrattler case is why Agent Burns was
18 going to be -- I guess that was the unrecorded portion -- or
19 excuse me, the recorded portion. They tried to record it,
20 didn't work, brought him back a second time.

21 MR. BRANOM: And that was Agent Schneider, I believe,
22 that was there with --

23 THE COURT: There's no scenario where two agents sat
24 and did the -- what they call the pre-polygraph interview.

25 MR. BRANOM: Right. It's always just Agent Smiedala

1 by himself.

2 THE COURT: You'll be free to cross-examine on that
3 question. "You know, you had an agent down the hall. You
4 didn't have him in there; did you?"

5 So now you have your word against his word.

6 MR. BRANOM: But I guess the cross would be slightly
7 more effective with: "You could have recorded. And then
8 later, actually you did, when you got to where you wanted."

9 So that's, again, back to the that's where the hands are
10 tied, I would submit, Your Honor.

11 THE COURT: All right.

12 Anything else, Mr. Branom?

13 MR. BRANOM: Just --

14 (A brief off-the-record discussion was had among
15 Mr. Branom and the defendants at counsel table.)

16 MR. BRANOM: Mr. Damon brings up an interesting
17 point, he was interviewed prior to the supposed polygraph
18 interview, and that one was recorded.

19 THE COURT: It was recorded?

20 MR. BRANOM: Yeah. Yes. So we've got -- I guess
21 that would be an -- obviously, distinguish somewhat the two
22 cases.

23 THE COURT: So that was Mr. Damon's.

24 MR. BRANOM: Yes.

25 THE COURT: Who interviewed him the first time?

1 MR. BRANOM: I think it was Burns and a tribal
2 officer. And I think that was right at your house; right?

3 Sorry, guys.

4 THE COURT: Take your time.

5 (A brief off-the-record discussion was had among
6 Mr. Branom and the defendants at counsel table.)

7 MR. BRANOM: Actually, in both of them, there were
8 recordings before this one. So, I guess, if the government --
9 yeah. It was Josh's --

10 THE COURT: Then, I guess, you'd be allowed to
11 cross-examine Agent Smiedala and say: "Well, you're aware that
12 there was an earlier -- earlier interview of Mr. Damon and
13 Mr. Birdrattler."

14 "Yes, I was."

15 And, in fact, I don't know whether he listened to it. I
16 mean, question him about whether he listened to that earlier
17 recording. All right.

18 And now -- I don't know, then it's getting difficult, I
19 agree, trying to put the genie back in the bottle.

20 MR. BRANOM: That would -- and I think we have that
21 scenario. And then, you know, there's another recording that
22 you don't hear, I think to be fair, we do need the instruction.
23 You're right, I -- bottom line, the government, I think, is
24 trying to put the toothpaste back in the tube when it's the one
25 that squeezed it out.

1 So, thank you for your -- if you don't have anything else,
2 thank you, Your Honor.

3 THE COURT: Thank you, Mr. Branom.

4 All right.

5 So Mr. Tatarka.

6 MR. TATARKA: With the court's indulgence, I think
7 we've sort of fleshed out the legal portion of the interview.
8 I would -- if the court --

9 THE COURT: Before Ms. Suek comes up.

10 MR. TATARKA: Sure.

11 THE COURT: I have a couple questions for you.
12 Mr. Branom has raised this point about we have previous
13 interviews of each of these defendants. And I can't remember
14 who conducted the interview, but apparently, those interviews
15 were recorded.

16 MR. TATARKA: Yeah. The agents.

17 THE COURT: Okay.

18 Would that be appropriate for cross-examination of Agent
19 Smiedala? Was he aware of those previous recordings? Did he
20 review the previous recordings?

21 MR. TATARKA: Yes, I don't think there's any problem
22 with the cross-examination of those. I don't know the answer
23 to those questions.

24 THE COURT: Okay.

25 Well, I don't either. But -- all right.

1 Let me hear from Ms. Suek, and then I'll have questions
2 for all the lawyers. I'll ask them when she's finished.

3 Good afternoon, Ms. Suek.

4 MS. SUEK: Good afternoon.

5 Your Honor, actually, the Deputee case was the first case
6 where we had a recording. Prior to that, the first decade of
7 my career, we had no recordings. And so the way it played out
8 was this, as it does in this case.

9 As the court may be aware, or I'll remind the court,
10 Special Agent Smiedala's written reports of both of these
11 interviews were appended to the defendants' suppression motion.
12 So when we say that we're not going to use the recording, we're
13 going to forego from using that piece of evidence, we actually
14 mean that we're going to forego from using it totally.
15 Because, certainly, Mr. Branom can question his memory, he can
16 question that he didn't do simultaneous notes, but there is a
17 report that Special Agent Smiedala can refer to that he can say
18 refreshed his memory, which is what we always did.

19 Interestingly enough, an analogy is the Deputee case, that
20 was not only the first case where we had a recording, but also
21 the first case in my career and what I know about in the
22 district, where we were actually able to bring up the operative
23 fact of polygraph. We had to stay away from that. That was
24 something we did by routine, just like we're going to do in
25 this case, staying away from the recording. Why? It's not to

1 hide evidence from the jury. There's all kinds of facts that
2 we never put before the jury, because they might be
3 inadmissible. They might be more prejudicial than probative.
4 That's just the facts of it. And polygraph was one of those
5 issues, where even though there was law that allowed us to
6 bring it up, we never did.

7 The Deputee case was extreme. And that is why the
8 government -- we were allowed to present that fact on rebuttal.

9 THE COURT: As I understand the Deputee case, the
10 defendant's cross-examination: "Now, you've told us three
11 things. And yet, your interview took an hour?"

12 MS. SUEK: Right.

13 THE COURT: And the response was: "Well, yes,
14 because I conducted a polygraph exam."

15 MS. SUEK: No. The cross-examination, he could not
16 say there was a polygraph exam. He was prohibited. So what
17 was happening throughout is that he would get questioned about
18 his special interrogation techniques, about the special skill
19 that he had over other agents, about the special techniques he
20 may use.

21 And the problem, if the court remembers, is the timing of
22 the Deputee case played into it. Special Agent Smiedala had
23 just come back from working with the Mossad, and waterboarding
24 was in the news. And all of that combined to create a
25 situation that was extraordinary. The cross-examination went

1 beyond the regular cross-examination, where he simply -- it
2 was, basically, in his mind, court-sanctioned lying. He could
3 not tell the jury what he really did. He could only just
4 answer the questions. "No. I -- you know, this is what I did.
5 This is how long it took." And leave all of the polygraph
6 information out of it.

7 That's how it operated.

8 So, this is not something new to suggest that we would not
9 -- we would be keeping a fact from the jury that in the court's
10 mind is creating such an evidentiary issue that we need a
11 cautionary instruction.

12 We just keep this away from the jury.

13 The only way that we'll open the door for this, is if
14 there's no other way to answer the question, but even that, in
15 my mind -- I mean, there was -- he was pretty much directly
16 asked over and over again what he did and he never answered:
17 "I'm a polygrapher," until the Deputee case, and that was on
18 rebuttal, not cross-examining.

19 So he can be instructed --

20 THE COURT: It was a sidebar before --

21 MS. SUEK: Well, we broke for the day. And there was
22 -- it was such an extraordinary cross-examination, I asked the
23 court to hold a hearing on the ability on the case law that was
24 in existence to bring this forward as an operative fact.

25 And interestingly enough in that case, Judge Cebull ruled

1 the way that he did, although reluctantly, because there was no
2 polygraph exam. I understand that the cases that the court has
3 referenced, that there has been no exam, but that's -- even in
4 this case, when Special Agent Smiedala was questioned by
5 Mr. Branom, he did say: "60 to 80 percent of my cases, I give
6 the test."

7 So, we actually had a situation that made Judge Cebul
8 more comfortable. There was no ability for the jury to infer
9 what the results would have been, because we didn't have a
10 test. And the Ninth Circuit actually noted that, as well, that
11 it made it easier to have that just as an operative fact.

12 Be that as it may --

13 THE COURT: Hold on. Let me follow-up on that: So
14 at some point, Agent Smiedala may be permitted to say: "Well,
15 I was there to give a polygraph exam." That's what his special
16 training is. Not initially, I'm talking about, if the
17 questions open the door for that.

18 MS. SUEK: Right.

19 THE COURT: All right.

20 And then he would say: "But I never gave it." And then,
21 eventually, provided the incriminating statement.

22 But I guess it would also have to be crossed on: "Well,
23 the defendant signed a consent form. He was ready and willing
24 to take the test."

25 MS. SUEK: Absolutely. And so, how this played out,

1 prior to the recordings, and how it would play out now, because
2 we had reports, like we do here, minus the recording. Special
3 Agent Smiedala would testify about the circumstances of the
4 interview, and from his reports, never, ever did take
5 simultaneous notes, because you can't build a rapport doing
6 that when you're dealing with a polygraph. So he never had
7 that, as other agents may in their interviews.

8 So: "No, I did not make simultaneous notes. The only
9 thing I have is the biographical sheet that I have and the
10 report that I wrote, the summary report. And that's what I've
11 used to refresh my memory about the statements."

12 THE COURT: What do the summary reports contain here?
13 I don't recall.

14 MS. SUEK: It's, basically, just a summary of the
15 defendants' statements.

16 THE COURT: Does it talk about the polygraph, though?

17 MS. SUEK: No. I mean, it's his statements. And so
18 -- and it's not something that would go to the jury. It's your
19 question was -- in answer to -- can I show it to the court?
20 May I approach?

21 THE COURT: Yeah. Give it to the clerk, please.

22 MS. SUEK: In answer to the court's questions as
23 to --

24 THE COURT: Can I put this on the screen? Any reason
25 I can't?

1 MS. SUEK: Sure.

2 As to how he would respond, and then he'd finally have to
3 blurt out: "Well, I recorded it."

4 Well, that's not true. Because he could say: "Well, I
5 reviewed my report."

6 THE COURT: This is just the polygraph exam report?

7 MS. SUEK: Right. But that would not go into
8 evidence. It's a writing that that allows him to review what
9 occurred.

10 THE COURT: Okay.

11 So, we can just refer to it more generically as a report.

12 MS. SUEK: That's exactly right. Just like they used
13 to question him when he was just a special interrogator or a
14 special interviewer. Yeah, there's no need to put polygraph
15 in. Like I said, the only time that ever came into play was
16 the extraordinary circumstance of the Deputee case. And it was
17 extraordinary. I mean, we never told the jury he was a
18 polygrapher. Because the -- even though there was law in the
19 Ninth Circuit in existence that allowed for this to come in as
20 an operative fact, that was just something we were never able
21 to convince the district court to allow us to do.

22 So, it is not that unusual, my point is, to keep a fact
23 away from the jury. Particularly, in this situation, where
24 it's a recording.

25 The fact -- the reason why -- the policy, the root cause

1 underlying why a cautionary instruction is even talked about
2 with respect to this type of evidence, is how incriminating it
3 can be for a jury to hear the defendant's words. We
4 respectfully disagree with Mr. Branom on that. This is -- it's
5 not the same to not -- to have an agent testify about a
6 defendant's words, versus a jury hearing them. We've never --
7 there's no case that I know of, anywhere, where a cautionary
8 instruction has been given when the government is presenting
9 the defendant's statements only through testimony.

10 And that's because it's the unique aspect of a recording
11 that makes that problematic to the court when there is not one,
12 or a partial recording.

13 And so, the cautionary instruction, in our view, isn't
14 triggered, just as the court's order gave us the evidentiary
15 triggers for it.

16 The scenario we're presenting to the court doesn't raise
17 the same concerns.

18 What it does is allow the jury to consider credibility of
19 witnesses. And the Model Pattern Instruction tells them to do
20 that. And that's their job, to consider whether they believe
21 Special Agent Smiedala and Burns, or whether they believe the
22 defendant if the defendant chooses to testify, or present other
23 evidence.

24 They're able to consider whether he made the statement,
25 under what circumstances. They've been doing it for a lot

1 longer than we've had the issue of recordings.

2 The only other thing I will address, Your Honor, we -- as
3 Mr. Tatarka told you, we will always try and get a copy of the
4 policy. We're not trying to hide that from the court. There
5 was a misunderstanding that we got an affidavit believing that
6 there was no written policy.

7 I still believe that's the case. But if we're wrong, I
8 think what she's referring to is a general policy manual, and
9 with respect to recording, there's no written policy that's
10 practiced. But I do understand the court's concern. And it's
11 not anything we're trying to hide. It's just a
12 misunderstanding in terms of whether it's in writing or not.
13 And we believed it wasn't, and that's why we got an affidavit.

14 THE COURT: Again, I highlight my concern, it's the
15 quotations in the affidavit about -- from the policy. So it
16 leads me to believe there's some document on which the agent's
17 relying.

18 MS. SUEK: Right.

19 And the other thing that I will tell you, Your Honor, is I
20 certainly was not in the meeting was Chief Justice and Director
21 Freeh. What I will tell you is, I've been here --

22 THE COURT: You're dating yourself. It was
23 Director --

24 MS. SUEK: Well, and I will date myself, since 1995.

25 THE COURT: It was Director Comey in 2015.

1 MS. SUEK: Comey. Okay.

2 So, the only policy that I know of, and I've been doing
3 Indian Country the whole time, is the one we provided the court
4 that was focused on custodial interviews encouraging recording
5 in other places. Noncustodial, and otherwise, that didn't meet
6 all of the requirements of the policy.

7 And we in Indian Country certainly encourage it.

8 But the polygraph unit, in our view, has always -- it's
9 just always been that exception, whether we agree or not, that
10 has always been an exception.

11 And so, I have -- I have no knowledge of any other policy
12 that was even talked about.

13 THE COURT: So, I guess, what you're telling me is to
14 be safe when it comes to the U.S. government, get it in
15 writing?

16 MS. SUEK: Always.

17 THE COURT: I guess -- well, what concerns me, again,
18 is we didn't have this issue for five years. And we were told
19 the policy has changed, we didn't have the issue for five
20 years, and suddenly we're back.

21 MS. SUEK: Well, we didn't have the polygrapher in
22 the district for five years, because Special Agent Smiedala was
23 back in D.C.

24 In the day, we never had a polygrapher in Montana, so the
25 courts were lucky to hear about polygraph evidence once every

1 other year. And then we had a polygrapher in the district.
2 And we used him as much as we could, but when he left, we
3 didn't have anybody to replace him. So, it was only by virtue
4 of a different assignment. We just didn't have polygraph, a
5 polygrapher to use in these cases.

6 THE COURT: All right.

7 Anything else?

8 MS. SUEK: No. Unless you have any other questions
9 for me.

10 THE COURT: No, thank you.

11 All right.

12 So, I was hoping that we'd be able to rule from the bench.
13 I don't think I can give you enough guidance to make that
14 worthwhile. I mean, I'm trying to balance, as I said, the
15 government's proposal to have the agent testify, to allow the
16 defense to have a robust cross-examination without inducing the
17 agent into blurting out the recording, or I guess, maybe what I
18 do is not allow the agent on cross-examination to testify to
19 that. And then have a sidebar before the government redirects
20 to discuss whether the door -- whether fairness would require
21 the court to allow some discussion of that. I think that's
22 probably the tactic I would take just to avoid an inadvertent
23 disclosure.

24 I think we could get through it without reference to the
25 recording. But there is that concern I have about --

1 Mr. Branom raised -- about one arm tied behind the back where
2 you get -- talk about -- refer to a report about all this.

3 I think, Mr. Branom, you'll have enough ability to
4 cross-examine without necessarily the adverse instruction
5 coming in.

6 What I would like the parties to do is give me a few
7 instructions, as well, that would be given in different
8 scenarios. Number one, whether the recording gets played, what
9 that specific language would entail.

10 Number two, you know, I'm not saying I would necessarily
11 give it -- if the recording didn't get played, Mr. Branom, what
12 would be appropriate if you were able to -- "Well, you had the
13 ability to do it, you didn't do it"; right?

14 If there's any kind of a looking with disfavor on or
15 dealing with skepticism, the testimony, when they had the
16 ability to record and did not.

17 So, there's a couple different scenarios. You get those
18 instructions to me. What? The trial's the 6th, so I'm gone
19 next week. Let me see a calendar here. How about by the 2nd
20 or 3rd? Would that be enough time?

21 Again, until I hear all the evidence, I'm not sure I can
22 say exactly what gets said and not said. But I think to be
23 safe on cross-examination, we'll instruct the agent not to
24 bring up the recording. And then, Mr. Branom, you'll have to
25 maybe have some discussion between the parties about where each

1 of you think the line would be drawn. What would be fair game,
2 what wouldn't. And then we could meet -- why don't we -- I'll
3 set up a hearing on the 2nd or 3rd. Probably the 3rd. I'll be
4 back in town on the 3rd. That's a Friday.

5 MR. BRANOM: I think I'm going to be gone then, Your
6 Honor. And also on timing, as I understand it, the government
7 is going to endeavor to find if there's a written policy. Do
8 we have --

9 THE COURT: Yeah. Yeah. Okay.

10 MR. BRANOM: -- time on that, too.

11 You know, maybe -- well --

12 THE COURT: As I understand the speedy trial
13 deadlines here, Mr. Damon's is February 26th.
14 Mr. Birdrattler's February 15th. Is that with the -- are we
15 stopped now?

16 MR. BRANOM: Yes. I believe we are, Your Honor.

17 MS. SUEK: We are stopped.

18 THE COURT: I mean, Mr. Damon is in custody. So, I
19 know that's no fun.

20 MR. BRANOM: Yes.

21 THE COURT: So, we do have to check on the policy.
22 When can you give me an answer on the policy?

23 MR. TATARKA: I think the only concern -- I would
24 confidently say by the end of this week, except for some
25 concerns about the holiday. And so, maybe to be safe, two

1 weeks. But we will endeavor to do it as soon as possible.

2 THE COURT: That gives me concern. We might have to
3 move this trial on the 6th.

4 Hold old, Mr. Branom.

5 MR. BRANOM: I'm holding.

6 THE COURT: I want to say -- before I get ahead of
7 myself, I want to see the policy, because that may have some
8 effect on what happens with regard to the trial instructions.
9 If there is no written policy, or written policy differs from
10 what we've been told, or has more discretion, then we have a
11 different question here.

12 Mr. Branom.

13 MR. BRANOM: We'd rather have it right than rush,
14 Your Honor.

15 THE COURT: I understand that. We're talking about a
16 week or two. We're not talking about putting this off -- I'll
17 juggle some other trials to make sure it happens in January for
18 Mr. Damon. It might not be the 6th, it might be the 20th or
19 27th. But we'll get it in.

20 I understand your hurdle, Mr. Tatarka, but give me that as
21 soon as possible.

22 MR. TATARKA: Absolutely, Your Honor. We'll get on
23 the phone this afternoon to start that process.

24 THE COURT: You'll get that to Mr. Branom, as well?

25 MR. TATARKA: Again, unless there's some reason

1 why --

2 THE COURT: Unless you have to file it under seal.
3 Then I'll give it an in camera review and make the decision
4 about whether a portion of it can be redacted. If there's
5 something to be redacted, so Mr. Branom has a chance to see it
6 and use it to prepare his cross-examination.

7 MR. TATARKA: Absolutely, Your Honor.

8 Like I said, we will endeavor as quickly as possible to
9 get you an answer -- to get you the policy, if possible. If
10 not, get you an explanation about why we can't.

11 THE COURT: What the status is. Here's the policy or
12 it doesn't exist, and here's what these quotes were taken from.

13 MR. TATARKA: As I said, we will start that process
14 before we even leave Great Falls.

15 THE COURT: Then, with regard to timing, if you give
16 me the jury instructions, how about, say, by the 10th, the
17 proposals?

18 MR. BRANOM: No. No. If you're going to move it, if
19 you just want to issue a whole new schedule. I mean, we're set
20 on the 6th, so I guess setting the 10th makes me --

21 THE COURT: Well, I'm talking about just the
22 instructions related to this issue, not all your instructions.
23 On the adverse -- whatever the content of the adverse inference
24 instruction, or the view with skepticism instruction would be,
25 regarding the failure to record or -- failure to record the

1 whole interview, or the failure to record it all.

2 MR. BRANOM: I'm sorry. By -- when do you want
3 those, Your Honor?

4 THE COURT: Well, assuming I can get a trial set on
5 the 20th.

6 MR. BRANOM: That's been -- that's what --

7 THE COURT: The 20th --

8 MR. BRANOM: Sure.

9 THE COURT: I believe the 20th is a holiday. The
10 21st or 27th, we might be able to squeeze in a trial those
11 days.

12 Counsel, do you have any conflicts in January, Ms. Adams?
13 Who's going to try the case?

14 MS. ADAMS: I believe Ms. Suek and I are trying it.

15 MS. SUEK: Right now, we're trying it.

16 I don't think so, Your Honor.

17 THE COURT: The two of you together are going to try
18 it?

19 MS. SUEK: Yes.

20 THE COURT: Okay.

21 Well, I will check my schedule, and then if necessary,
22 convene a phone conference to make sure everyone's available,
23 either the 21st or 27th, I hope.

24 But I'm only talking about the instruction, Mr. Branom,
25 related to the issues raised by these motions. Not all your

1 jury instructions, just the --

2 MR. BRANOM: So, certainly the 10th, which is what I
3 understood you to say.

4 THE COURT: Does the 10th work as well for the
5 government?

6 MR. TATARKA: Absolutely, Your Honor.

7 THE COURT: So, what I would propose doing, then, is
8 convening a new hearing -- if the trial's the 27th, convening a
9 hearing the week of the 21st to try to give you as much
10 guidance as I can. And I urge you to have some discussions
11 yourself.

12 I spoke at the county bar lunch last week and it was
13 critical of their civil lawyers' failure to communicate without
14 the court's involvement. So, I'll put the burden on you two,
15 Mr. Branom and Ms. Adams, to get together and see if you can
16 work out some -- you don't have to agree entirely, but just
17 where those boundaries ought to be, and what some of the issues
18 of concern are.

19 Okay?

20 MR. BRANOM: Thank you, Your Honor.

21 THE COURT: Understood, Mr. Tatarka?

22 MR. TATARKA: Understood, Your Honor.

23 The only place I want to make clear, just so there wasn't
24 any -- any miscommunication from what we've presented, is that
25 it's still the United States' position that if -- that if we

1 did not elicit, and as you say, not fairly within the bounds
2 elicit that -- the recording, that even if the defense makes it
3 an issue, we don't think there should be an adverse
4 instruction. And I think the court understands that and
5 understands that it's reserving that among its considerations.
6 I just want to make that clear, so -- just in case it seemed
7 like we had conceded that point.

8 THE COURT: All right.

9 I want to make sure I understand before I respond.

10 I know you don't want to concede that point. But I think
11 if you bring it up -- if you bring the recording up -- if the
12 government brings up the recording, you will get the adverse
13 inference instruction.

14 MR. TATARKA: We acknowledge that.

15 THE COURT: Okay.

16 Make sure we're clear on that point.

17 MR. TATARKA: Yes. Absolutely.

18 Our intention was never to challenge your initial ruling.
19 Our hopes are that we were within the bounds of that, which I
20 would note that your order does say "if the government raises
21 this."

22 THE COURT: All right.

23 Anything else?

24 MR. BRANOM: I look forward to the next hearing, Your
25 Honor.

1 Thank you.

2 THE COURT: Thank you, all.

3 We're in recess.

4 (The proceedings in this matter were adjourned at
5 3:32 p.m.)
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8

9 C E R T I F I C A T E
10

11 I certify that the foregoing is a correct transcript from
12 the record of proceedings in the above-entitled matter.

13 /s/ Tina C. Brilz, RPR, FCRR

14 Dated this 26th day of December, 2019.
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